No. 17,432

IN THE

United States Court of Appeals

For the Ninth Circuit

OLSON TOWBOAT COMPANY, OLSON STEAMSHIP CO., the Tug "JEAN NELSON", the Barge "FLORENCE",

Appellants,

vs.

JOAO DUTRA,

Appellee.

BRIEF FOR APPELLANT

JOHN H. BLACK,
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Proctors for Appellant.

Subject Index

Table of Authorities Cited

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STATEMENT OF THE CASE

The appellant herein, Olson Towboat Company, a corporation, owned and operated the tugboat "JEAN NELSON" and the barge "FLORENCE". On November 1, 1959 appellee was employed by appellant aboard said tug and barge at Bandon, Oregon. The barge and tug were tied up to the city dock at Bandon, Oregon. After the tug put its tow line to the bridle of the back of the barge, appellee was to take the lines off the barge and let them go. He had put several of the lines off the barge, and the spring line

was next. He picked the line off the bitt, lifted it up and held it in his hands and waited for the man on the dock to tell him to let it go. This particular wire spring line is fastened with a loop at the end which fits over the bitt. The man on the dock told him to let the line go, and as he let it go something cut his finger.

The appellee at no time saw the condition of the wire loop before he let it go and does not know what caused his finger to be cut.

The appellee does not know who owned the particular line that he was handling. There were other tugs that used this municipal dock at which the tug "JEAN NELSON" and the barge "FLORENCE" were docked on this occasion.

Appellee sustained an injury which later resulted in an amputation of the distal end of the right index finger.

STATEMENTS OF POINTS INVOLVED

1. Is the appellee entitled to a verdict for general and special damages from appellant herein merely because of the fact that his finger was cut after he let go a mooring line?

2. Can appellee recover from appellant without showing any condition of negligence on the part of Olson Towboat Company or unseaworthiness on the part of the tug "JEAN NELSON" or the barge "FLORENCE"?

3. Is the District Court entitled to speculate as to the cause of injury to appellee where there was no showing that the appellant owned the wire line and loop, or that there was a defect in the wire loop?

SUMMARY OF ARGUMENT

The case for the appellant is summarized as follows:

1. The trial court speculated as to the cause of injury.

2. The court erred in its Findings of Fact and Conclusion of Law where there was no "scintilla of evidence" to justify them.

ARGUMENT

The appellee relied upon two courses of action, one for negligence and one based upon seaworthiness.

On the negligence course of action, appellee relied upon the Jones Act and the appellee bore the burden of going forward with the evidence on the essential elements of a negligence action, that is the existence of a duty; the negligent violation of the duty by the defendant; and the causal relationship of violation to injury.

On direct examination of appellee by his counsel (at page 26 of the Transcript) appellee recited that after the tug had put its towline to the bridle on the back of the barge, the next duty was to take the spring line

and let it go. The appellee stated that he cast off two lines and the spring line was next, and he testified as follows at page 27 transcript:

"Q. Then what happened?

A. I picked up the line and held on with my hands until—I wait for the man on the dock to tell me to let it go. It's a heavy line. One thing you have a loop, a wire loop.

Q. This wire loop, that's on the end that goes over the bitt on the barge?

A. That's right.

Q. How far did the wire extend?

A. Oh, a fathom—what you call this.

Q. A fathom?

A. Yes. Like this. (Gesturing.)

Q. Extending your hands about three feet?

A. That's right.

Q. Connected to the nylon?

A. That's right.

Q. What happened then?

A. I hold it and wait for them to tell me to let it go.

Q. Who?

A. For the man of the crew also there to help us working that day. He told me 'O.K., let her go' and when I let her go something in my hands cut me and my finger. I didn't see proper because I am in a hurry and blood comes out and I put my handkerchief down here around and keep working but I couldn't do a proper job—in my hand it hurts me. . . ."

On cross-examination of the appellee he recites that he was taking a line off a bitt that was located on the barge and testified as follows at page 35 transcript:

"Q. And did you get the line off the bitt?
A. Yes.
Q. You held it in your hand?
A. By both hands.
Q. It had a loop on it?
A. Yes.
Q. Did you hold it this way, or this way (gesturing)?
A. This way (holding both hands up in front of face (23) palms in).
Q. This way, in the loop?
A. Yes.
Q. In other words—how big was that loop?
A. About this big around.
Q. You had it held with both hands?
A. Yes, both hands.
Q. Was there someone on the dock?
A. Yes.
Q. Who was he?
A. I don't know his name. He's an oiler, that's all I know.
Q. What did he say?
A. Let go.
Q. Let it go?
A. Yes, and I—see the line is straightened out, you got to straighten it out like this, these heavy lines have to straighten out like this at the time you let her go, and it cut me. . . ."

He further stated that he had the line in his hand and held it up in the vicinity of his face and after he let the line go, he noticed his finger was bleeding and further testified as follows at page 38 transcript:

"Q. Did you ever see what the condition of this wire loop——

A. Well——

Q. Just a minute, please. Did you ever see the condition of this wire loop any time before you let it go?

A. No.

Q. You don't even know what it is today, do you?

A. No. I can see more or less what it looks like.

Q. Up to this day you don't actually know what caused your finger to be cut, do you?

A. I know something in the loop.

Q. Do you know what actually caused the tear?

A. Something in the loop to cut my finger.

Q. You never saw anything, did you Mr. Dutra?

A. No, I couldn't see—you got to pick it up fast and let it go.

Q. You don't know whether there was a cut in that wire, or threads loose about that wire, or anything loose, do you?

A. You talk too fast for me. (28)

Q. Well, I will ask you one question at a time. You can't tell me what condition that line was in because you didn't pay any attention to it, did you?

A. I didn't pay any attention?

Q. You didn't see it?

A. I couldn't pay any attention. You have to work fast. There's no time to take a look.

Q. I understand you have to work fast, but my question has nothing to do with that. I am asking a very simple question. Do you ever see the condition of that line or that loop?

A. No.

Q. You don't know whether or not there were any snags or cut wires in there, do you?
A. I didn't see anything.
Q. You didn't see anything?
A. No."

He further stated that his opinion as to the fact that there must have been something wrong with the rope was based upon pure speculation at page 39 transcript:

"Q. So what you are saying, in effect, Mr. Dutra, is because my finger got cut, there must have been something wrong with the wire or part of it——
A. That's right.
Q. ——isn't that what you are telling this Court?
A. Yes, something wrong with the bitt or loop.
Q. In other words, Mr. Dutra, you are guessing there was something wrong with the loop, is that correct?
A. That's right. . . ."

This, in effect, summarizes the testimony of appellee on direct examination and cross-examination. There is not one bit of evidence of any negligence on the part of appellant. To sustain the appellee herewith, the Court would have to infer from the evidence that there was something wrong with the rope. This would be speculation run riot. Speculation cannot supply the place of proof.

Moore v. Chesapeake & Ohio Railroad Company, 340 U.S. 573 at page 578.

In the case of *King v. Nicholson Trust Company,* 46 N.W. 2d 389, 1957 A.M.C. 1888 at page 1892, the court stated:

> "The law is well settled that a case should not be submitted to the jury where a verdict must rest upon a conjecture or guess. See Fuller v. Ann Arbor Railroad Co., 141 Mich, 66; Powers v. Pere Marquette Railroad Co., 143 Mich. 379; and Scott v. Boyne City, Gaylord & Alpena Railroad Co., 169 Mich. 265.
>
> In the case of Lieflander v. States Steamship Company, 1935 A. M. C. 559, 562, 149 Or. 605 (42 P. (2d) 156), a case brought under the Jones Act, the court stated:
>
> 'In determining whether the evidence is sufficient to support the verdict in this case, we are governed by the federal rule as to whether there is substantial evidence tending to show a breach of duty on the part of the steamship company. The scintilla rule has no application.' . . ."

It will be noted in the cause of action for negligence under the Jones Act, appellee charges as follows:

> "respondents, their agents, servants and employees so carelessly and negligently operated said tugboat and barge so as to allow a mooring cable to become frayed and defective and while libellant was handling said cable, it so lacerated his right index finger so as to cause a portion of same to be consequently amputated." (Tr. p. 4.)

As to the cause of action for unseaworthiness, appellee charges in this cause of action as follows:

> "respondents, their agents, servants and employees allowed the aforesaid tug and barge to be unseaworthy in that respondents, their agents, servants and employees failed to supply libellant with a safe place within which to work while he was aboard said barge in that the mooring line was frayed and defective; failed to warn libellant of the dangers to be encountered in handling such a frayed and defective line;" (Tr. p. 6.)

As to the unseaworthiness cause of action, there is no showing of a defective appliance from the evidence adduced. The burden of proof of unseaworthiness rests upon appellee.

> *Freitas v. Pacific Atlantic Steamship Co.,* 218 F. 2d 562.

It will be noted that the original findings of fact and conclusions of law were not signed. The original findings of fact found that:

> "respondents negligently operated said vessels so as to allow the mooring cable to *become frayed* and defective and as a proximate result thereof, libelant in casting off said cable suffered a laceration and amputation of his right index finger at the first joint."

The amended findings of fact and conclusions of law delete the word "frayed" and merely alleged that the mooring cable became defective.

CONCLUSION

It is submitted that the trial court speculated as to the cause of injury, there being no evidence before the Court to substantiate a verdict for appellee in this matter; and secondly that there is not a scintilla of evidence to justify findings of fact and conclusions of law.

It is respectfully submitted that the judgment of the lower court be reversed, with instructions to enter judgment on behalf of appellant as against appellee.

Dated, San Francisco, California,
November 24, 1961.

JOHN H. BLACK,
HENRY SCHALDACH,
Proctors for Appellant.